

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE METHYL TERTIARY BUTYL ETHER)
("MTBE") PRODUCTS LIABILITY)
LITIGATION)

This document relates to:)

Orange County Water Dist. v. Unocal Corp.,)
et al., 04 Civ. 4968 (SAS))

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PRE-TRIAL ORDER # 69

(Motion of Tesoro Defendants to Compel Regarding Plaintiff's Subpoenas to "Jobbers")

Defendants Tesoro Corporation and Tesoro Refining and Marketing Company (collectively, "Tesoro") move for "an order compelling Plaintiff Orange County Water District ('OCWD') to confirm the identities of the 'jobbers' to whom it issued subpoenas in this case and to produce all documents or declarations of no records received from those jobbers." Although the written submission from OCWD on this motion was unclear on the disposition of records received by OCWD from the "jobber" subpoenas, it is now clear, based on statements made by counsel for OCWD and for defendants during the telephonic oral argument on this motion, that the identities of the subpoenaed jobbers is confirmed, that the documents sent by OCWD from those subpoenas to defendants is confirmed, and that OCWD, through Mr. Axline, its attorney, represents that whatever OCWD received from those subpoenas – whether or not in support of OCWD's contentions – was sent to defendants.

Therefore, there is no basis for me to issue an order compelling OCWD to confirm the identity of "jobber" subpoenas when the identity of those subpoenas has already been confirmed on the record. Nor is there any basis for me to require OCWD to send to defendants further documents from the "jobber" subpoenas when OCWD's counsel represents that no such further

documents exist beyond what has already been sent to defendants, and defendants have no basis for claiming otherwise. Nor is there any basis for me to issue an order precluding OCWD from offering at trial any documents from the "jobber" subpoenas that were not produced to defendants, because as noted OCWD claims that there are no such documents and that it produced all documents it received from the "jobbers". A preclusion order is appropriate where identifiable documents that should have been produced have not been produced and an order issues requiring that production, which is not the case here. Withholding documents despite a proper discovery demand or a Rule 26(a) obligation to produce those documents is a valid ground for moving to preclude introduction of any such withheld documents at trial, so if such a situation were to arise at trial here (a situation the record to date does not indicate will take place) it can be addressed by defendants without the need for any preclusion ruling from me. *See U.S. v. Boyce*, 148 F.Supp.2d 1069 (S.D. Cal. 2001).

For the foregoing reasons, Tesoro's Motion to Compel Regarding Plaintiff's Subpoenas to "Jobbers" is denied.

Dated: December 2, 2011

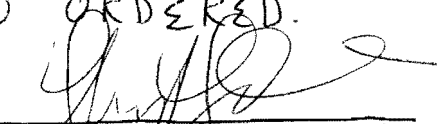
SO ORDERED:


KENNETH E. WARNER, Special Master

The Clerk of the Court is
directed to docket this
Pre-Trial Order.

SO ORDERED.

New York, New York²-
December 15, 2011


Shira A. Scheindlin
U.S. D.J.